Supreme Court, U.S.
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No. 87-1776

In The

Supreme Court of the United States

October Term, 1987

BETTY PERKINS,

Petitioner,

vs.

EASTERN NEBRASKA HUMAN SERVICES AGENCY, A Political Subdivision,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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app

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner, in establishing her claim of intentional racial discrimination under 42 U.S.C. 1981 and Title VII bears the burden of proof and persuasion of a discriminatory motive and causation?

2. Whether the test for causation in a Title VII case is the "but for" cause?

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's App. 1) is not yet reported.

The opinion of the District Court (Petitioner's App. 2) with respect to entry of its judgment on Petitioner's Title VII action is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1988. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

ADDITIONAL STATEMENT OF THE CASE

The evidence in this case indicates that the director of transportation for the Respondent after the altercation between the Petitioner and a fellow employee requested the participants and witnesses to provide her with written statements so that she could take appropriate disciplinary action, if warranted.

All employees, except the Petitioner, complied with her request. Petitioner refused to provided her with a written version despite the director's repeated inquires.

After reviewing all the written responses, personnel files, and the Respondent's personnel policies, a decision was jointly reached by the Respondent's director of transportation, affirmative action officer and Petitioner's immediate supervisor to discharge the Petitioner.

All three participants in the joint decision based their decision to discharge the Petitioner and only reprimand the other employee for the incident upon the consensus reached by the investigation that (1) the Petitioner was the instigator, (2) had a prior history of such behavior, (3) had used the radio to transmit her language and had not responded to the allegations. Whereas the fellow employee's actions, although subject to discipline, were less culpable and she had no previous history of such behavior.

The respective race of the two employees was not a consideration in the joint decision on discipline. At the final meeting with Petitioner, the director still attempted to ascertain her response but to no avail. Consequently the director discharged her from employment at the meeting on October 19, 1983.

REASONS FOR DENYING THE WRIT

1. The narrow factual issue presented in this case was decided adversely to the Petitioner. The Petitioner neither asserts that the decision herein is in conflict with the decisions of other circuits, nor is contrary to any decisions of this Court.

Petitioner in her claim of racial discrimination under 42 U.S.C. 1981 and Title VII must establish that the Respondent intentionally discriminated against her. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 383 (1982), *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

The Petitioner's burden of proof and persuasion in her case of disparate treatment requires proof of a discriminatory "motive." Proof of illegal motivation is crucial to her 1981 or Title VII disparate treatment case. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n 15 (1977).

The Petitioner bears the burden of establishing causation in her 42 U.S.C. 1981 and 42 U.S.C. 2000e-2 claims. The test for causation and resultant liability is the "but for" cause enunciated in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n 10 (1976).

Petitioner erroneously contends that the "but for" test for causation in *McDonald v. Santa Fe Trail Transportation Co.* required the Petitioner to establish that race was the sole factor in the employment decision. Petitioner's contention not only misinterprets the decision in *McDonald v. Santa Fe Trail Transportation Co.*, but mischaracterizes the Eighth Circuit Court of Appeal's application of the "but for" test for causation in her case. Despite Petitioner's contentions neither the *McDonald v. Santa Fe Trail Transportation Co.* decision nor the Circuit Court of Appeals required Petitioner to meet a stricter "sole factor" test for causation (Petitioner's App. 5).

2. Nor is this an appropriate case to consider, as suggested by Petitioner, the abandonment of the *McDonald v. Santa Fe Trail Transportation Co.* causation test for Title VII in favor of the "same decision" test for First Amendment retaliatory discharge cases announced in *Mt. Healthy City School District Board of*

Education v. Doyle, 429 U.S. 274 (1977), since the District Court found that race did not play a part in the discharge of the Petitioner. This finding by the District Court is both supported by the evidence and consistent with the jury's finding under 42 U.S.C. 1981 that the Respondent did not discriminate against the Petitioner on the basis of her race (Petitioner's App. 1, 5-6).

Consequently, the Petitioner is unable to prove racial discrimination under either the *McDonald v. Santa Fe Trail Transportation Co.* "but for" test, or the *Mt. Healthy* "same decision" test, since her race played no part in Respondent's employment decision (Petitioner's App. 5-6).

Petitioner's erroneous interpretation of the *McDonald v. Santa Fe Trail Transportation Co.* causation test is compounded by her faulty contention that her case is a mixed motive discharge case. Unlike the factual mosaic in *Mt. Healthy* in which the school board considered constitutionally protected conduct along with non-protected activity in its consideration not to rehire a teacher, Respondent considered only legitimate non-racially motivated reasons in its employment decision (Petitioner's App. 1, 5-6).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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